

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RIVERKEEPER, INC., *et al.*,

Plaintiffs,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, *et al.*,

Defendants.

Case No. 06 Civ. 12987 (PKC)
ECF case

**INTERVENOR'S REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS'
MOTION TO DISMISS**

Intervenor the Cooling Water Intake Structure Coalition (“the Coalition”) states as follows in response to the Defendants’ Motion for a Stay of Proceedings (“EPA’s Motion”):

The Coalition supports EPA’s Motion and agrees with the arguments in EPA’s Memorandum of Law in Support of EPA’s Motion. The Coalition wishes merely to emphasize a couple of points.

First, the only reason that we *have* litigation in two courts concerning the same issues is that petitioners Riverkeeper, et al. (“Riverkeeper”) chose to file this action *in addition* to the petitions for review under Clean Water Act section 509(b)(1)(E), 33 U.S.C. § 1369(b)(1)(E), that they had filed months earlier. Moreover, the instant action was filed only after Riverkeeper learned that its consolidated petitions for review had been assigned to a court of appeals apparently not to Riverkeeper’s liking, the Fifth Circuit, pursuant to the procedure Congress established in 28 U.S.C. § 2112(a). Indeed, it was only after it failed in its subsequent attempt to

have the consolidated cases transferred to its preferred venue, the Second Circuit, that Riverkeeper asserted its claim that the courts of appeals lack jurisdiction.

The Coalition informed the Court, in the Coalition's March 28, 2007 reply memorandum in support of EPA's motion to dismiss, that Riverkeeper had asked the Fifth Circuit to transfer its petitions for review to the Second Circuit, without suggesting that neither the Fifth Circuit nor the Second Circuit had jurisdiction over the claims being asserted in those petitions for review. *Id.* at n. 3. The Coalition also informed the Court that Riverkeeper's motion to transfer had been denied. *Id.*

Riverkeeper's claims, including its claim that the courts of appeals lack jurisdiction, have now been fully briefed in the Fifth Circuit, with Riverkeeper's reply brief having been filed on October 29, 2007. Now, however, Riverkeeper seeks to negate that entire briefing: on October 31, 2007, Riverkeeper filed a motion with the Fifth Circuit, asking that it stay its proceedings pending resolution of an appeal to the Second Circuit of this Court's denial of EPA's motion to dismiss, an appeal that is not even been filed!

As a result of Riverkeeper's blatant forum-shopping, the Coalition's members have incurred substantial legal expenses to participate in two different proceedings addressing the same subject matter. If Riverkeeper has its way, those unnecessary expenses will climb even higher, because the Coalition would need to participate in briefing before the Second Circuit of Riverkeeper's jurisdictional arguments, which have already been fully briefed in the Fifth Circuit.

The Coalition urges the Court to avoid any further unnecessary, duplicative briefing and to stay the proceedings in this case pending the decision of the Fifth Circuit, as requested in EPA's Motion.

Dated: October 31, 2007

Respectfully submitted,

/s/
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